Score Option Sdn Bhd & Anor v Duar Tuan Kiat (sued as the appointed receivers and managers of Score Option Sdn Bhd & Austral Development Sdn Bhd) & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22 NCVC-2247 OF 2011
AMELIA TEE ABDULLAH JC
13 JULY 2011

Companies and Corporations — Receivership — Receivers and managers — Appointment under debentures — Whether directors of companies had locus standi to sue receivers and managers — Action to injunct receivers and managers from selling companies' land — Whether action threatened interests of debenture holder and interfered with functions of receivers and managers — Whether directors' failure to give companies indemnity against costs prejudiced debenture holder — Whether receivers and managers as agent of chargor exempted from selling charged land via judicial sale

In consideration for the grant of several loan facilities by the third defendant ('MBB') to them for the purchase of a piece of land ('the land'), the first and second plaintiffs ('the plaintiffs') executed in MBB's favour, three debentures creating a fixed and floating charge over the companies' moveable and immoveable assets and also executed legal charges over the land. When the plaintiffs defaulted on the loan facilities, MBB, pursuant to the debentures, appointed the first and second defendants as receivers and managers for the plaintiffs. When the receivers and managers entered into a sale and purchase agreement with the fourth defendant for the sale of the plaintiffs' assets, including the land, the plaintiffs' directors ('the directors') filed the instant action against the defendants to, inter alia, prevent the completion of the sale of the land. The receivers and managers entered conditional appearance to the suit and filed an application (encl 13) to set aside the writ and statement of claim under O 12 r 7 of the Rules of the High Court 1980 on the grounds the directors lacked locus standi to maintain the action against them. The receivers and managers argued that the directors' action interfered with their function of realising the plaintiffs' assets to satisfy the claims of the debenture holder and prejudiced MBB's recovery process. They also argued that the directors' failure to provide an indemnity for costs to the plaintiffs, in the event the directors were unsuccessful in the suit, prejudiced MBB by exposing it to a risk of financial loss. The directors' preparedness to give an undertaking as to costs or as to damages, they said, was insufficient. The directors, inter alia, alleged the receivers and managers had breached their duties in selling the charged land via

tender or private sale instead of by way of judicial sale in accordance with the National Land Code ('NLC').

Held, allowing encl 13 to strike out the suit with costs and striking out the directors' application in encl 4 with costs:

(1) The directors had no locus standi to commence the action in the name of the plaintiffs against the receivers and managers (see para 43).

(2) The action of the directors to stop the sale of the land threatened the interests of MBB as debenture holder, interfered with the functions of the receivers and managers in getting in the plaintiff's assets, namely the land, and, in their failure to give an indemnity to the plaintiffs against costs and damages, potentially placed an inordinate and additional financial burden on the plaintiffs which would have had a direct impact on their assets (see para 42).

(3) As the receivers and managers were acting as the agent of the chargor pursuant to cll 12.1(b) and 12.2 of the debenture, the provisions of s 256(2) of the NLC prescribing judicial sale of the land did not apply in the instant case (see para 41).

(4) Merely pleading that the directors would give an undertaking as to costs fell far short of the requirement of giving an indemnity as to costs to the plaintiffs (see para 36).

[Bahasa Malaysia summary

Sebagai balasan bagi pemberian beberapa kemudahan pinjaman oleh defendan ketiga ('MBB') kepada mereka untuk membeli sebidang tanah ('tanah tersebut'), plaintif pertama dan kedua ('plaintif-plaintif') menandatangani memihak kepada MBB, tiga debentur membentuk caj tetap dan terapung terhadap aset-aset syarikat yang boleh dialihkan dan tidak boleh dialihkan dan juga menandatangani caj sah terhadap tanah tersebut. Apabila plaintif-plaintif gagal membayar kemudahan pinjaman tersebut, MBB, berikutan debentur tersebut, melantik defendan pertama dan kedua sebagai penerima dan pengurus kepada plaintif-plaintif. Apabila penerima dan pengurus memasuki perjanjian jual beli dengan defendan keempat untuk jualan aset plaintif-plaintif, termasuk tanah, pengarah-pengarah plaintif ('pengarah-pengarah') memfailkan tindakan ini terhadap defendan-defendan untuk, antara lain, menghalang penyelesaian jualan tanah tersebut. Penerima dan pengurus memasukkan kehadiran bersyarat kepada guaman tersebut dan memfailkan permohonan (lampiran 13) untuk mengetepikan writ dan penyata tuntutan di bawah A 12 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 atas alasan pengarah-pengarah tiada locus standi untuk mengekalkan tindakan terhadap mereka. Penerima dan pengurus menghujah bahawa tindakan pengarah-pengarah mengganggu fungsi mereka untuk merealisasikan aset-aset plaintif-plaintif untuk memuaskan tuntutan-tuntutan pemegang debentur

dan memprejudis proses mendapatkan semula MBB. Mereka juga menghujah bahawa kegagalan pengarah-pengarah untuk memperuntukkan indemniti untuk kos kepada plaintif-plaintif, jika pengarah-pengarah tidak berjaya dalam guaman tersebut, memprejudis MBB dengan mendedahkannya kepada risiko kerugian kewangan. Kesediaan pengarah-pengarah untuk memberikan akujanji terhadap kos atau terhadap kerugian, menurut mereka, adalah tidak mencukupi. Pengarah-pengarah, antara lain, mendakwa penerima dan pengurus telah melanggar kewajipan mereka dalam menjual tanah yang digadaikan melalui tender atau jualan persendirian dan bukan melalui jualan kehakiman berikutan Kanun Tanah Negara ('KTN').

Diputuskan, membenarkan lampiran 13 untuk membatalkan guaman dengan kos dan membatalkan permohonan pengarah-pengarah dalam lampiran 14 dengan kos:

(1) Pengarah-pengarah tidak mempunyai locus standi untuk memulakan tindakan atas nama plaintif-plaintif terhadap penerima dan pengurus (lihat perenggan 43).

(2) Tindakan pengarah-pengarah untuk memberhentikan jualan tanah mengancam kepentingan MBB sebagai pemegang debentur, campur tangan dengan fungsi penerima dan pengurus dalam mendapatkan aset-aset plaintif-plaintif, iaitu tanah tersebut, dan, dalam kegagalan mereka untuk memberikan indemniti kepada plaintif-plaintif terhadap kos dan kerugian, sebagai potensi meletakkan beban kewangan yang melampau dan bertambah atas plaintif-plaintif yang akan mempunyai impak secara langsung atas aset-aset mereka (lihat perenggan 42).

(3) Sebagai penerima dan pengurus mereka bertindak sebagai ejen kepada pemberi gadaian berikutan klausa 12.1(b) dan 12.2 debentur, dan peruntukan-peruntukan s 256(2) KTN menyatakan jualan secara kehakiman tanah tersebut tidak beraplikasi di dalam kes ini (lihat perenggan 41).

(4) Semata-mata memplid bahawa pengarah-pengarah akan memberikan akujanji terhadap kos tidak memenuhi keperluan memberikan indemniti terhadap kos kepada plaintif-plaintif (lihat perenggan 36).]

Notes

For cases on receivers and managers, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 772–773.

Cases referred to

Deangrove Pty Ltd (recs and mgrs apptd) and Anor v Commonwealth Bank of Australia 2002 AUST FEDCT LEXIS 370, FC (refd)

Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors [1997] 2 MLJ 805, SC (refd)

Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor [2003] 2 CLJ 86, FC (folld))

Moss Steamship Co Ltd v Whinney [1912] AC 254, HL (refd)

Newhart Developments Ltd v Co-operative Commercial Bank Ltd [1978] 2 All ER 896, CA (folld)

Risasa Industry (M) Sdn Bhd v Malaysian Industrial Development Finance Berhad & Anor [2008] 6 CLJ 667, HC (refd)

B Johnson & Co (Builders) LD Re [1955] 1 Ch 634 (refd)

Simpang Empat Plantation Sdn Bhd v Ali bin Tan Sri Abdul Kadir & Ors [2006] 1 MLJ 93; [2006] 1 CLJ 41, CA (refd)

Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd [1992] 1 MLJ 553; [1991] 4 CLJ 63 (Rep), HC (refd)

Tudor Grange Holdings Ltd and Others v Citibank NA and Another [1991] 4 All ER 1 (refd)

Legislation referred to

Companies Act 1965 ss 190(2), (3), 223
National Land Code s 256(2)
Rules of the High Court 1980 O 12 r 7

V Siva (R Thayalan, Mogan RK and Jennifer Chandran with him) (Vaasan Chan & Chandran) for the plaintiffs.

TM Eng (Celestina Chin with him) (Jal & Lim) for the defendants.

Amelia Tee Abdullah JC:

ENCLOSURE 13 — STRIKING OUT APPLICATION

THE PARTIES

[1] The plaintiffs, *Score Option Sdn Bhd* ('Score Option') and *Austral Development Sdn Bhd* ('Austral Development'), in respect of whom receivers and managers have been appointed, have filed a writ of summons and statement of claim against the defendants, inter alia, claiming various injunctive reliefs.

[2] *Duar Tuan Kiat* ('the first defendant') and *Adam Primus Varghese bin Abdullah* ('the second defendant') are sued as the appointed receivers and managers of Score Option and Austral Development. The court agrees that essentially it is the directors of the Score Option and Austral Development who are pursuing this action against the defendants. As such, to prevent confusion, the court will refer to the party making this claim as 'the Directors' and the Score Option and Austral Development as the first and second plaintiffs respectively.

[3] The third defendant, *Malayan Banking Bhd*, had granted several loan facilities to the first and second plaintiffs for the purchase of land held under HS (D) 112510 Lot No PT 2063 Mukim and District of Petaling, Selangor Darul Ehsan, Selangor ('the impugned land'). The first and second plaintiffs had executed three debentures dated 10 April 2008 in favour of the third defendant creating a fixed and floating charge over its moveable and immoveable assets as well as executed charges in favour of the third defendant in respect of the impugned land. It was as a result of the default of the first and second plaintiffs in respect of the loan facilities that the third defendant exercised its right under the debentures to appoint receivers and managers for the first and second plaintiffs on 29 January 2010.

[4] *Glomac Alliance Sdn Bhd* ('the fourth defendant') entered the picture when the receivers and managers entered into a sale and purchase agreement dated 21 January 2011 with it for the sale of the plaintiff's assets which includes the impugned land.

[5] In its statement of claim, the plaintiffs are seeking various injunctive relief, inter alia, to restrain the defendants from proceeding with the sale and purchase agreement dated 21 January 2011 entered into between the first plaintiff and the fourth defendant relating to the land.

[6] The first and second defendants have entered conditional appearance on 1 April 2011. Vide encl 3, they have now filed a summons in chambers to set aside the writ of summons and statement of claim pursuant to O 12 r 7 of the Rules of the High Court 1980 on the grounds that the directors, while pursuing the action in the names of the first and second plaintiffs, lack the locus standi to maintain the action against the first and second defendants.

THE AFFIDAVITS

[7] In its affidavit in support (encl 14), the first defendant has averred that the directors do not have the locus standi to commence the action against the first and second defendants as the directors have failed to satisfy the conditions necessary to enable them to commence action against the first and second defendants as receivers and managers of the first and second plaintiffs. In his affidavit in reply (encl 19), Chek Jamal bin Baharom, one of the directors of the plaintiffs and a shareholder of the second plaintiff, had taken issue with the first and second defendants incorporating two separate affidavits in respect of two separate applications in a single affidavit. There was also a complaint that the first and second defendants had not supported their claim that the directors lack locus standi with relevant case law to enable them to reply specifically and appropriately. Vide encl 25, the first defendant states that the directors do not have locus standi because 'such action is tantamount to an interference of the

functions of the Receivers and Managers and affecting the assets of the Plaintiffs'. In response, Che Jamal bin Baharom has affirmed an affidavit (encl 31) stating that the directors of the plaintiffs are entitled to commence this action 'untuk kebaikkan Plaintif-Plaintif dan juga pihak-pihak lain yang mungkin terlibat secara tidak langsung'.

THE LAW

[8] The issue as to whether the directors of a company in receivership has the locus standi to commence an action against the debenture holders was decided in the case of *Newhart Developments Ltd v Co-operative Commercial Bank Ltd* [1978] 2 All ER 896. In that case, the directors of a company in receivership had, without the receiver's knowledge or consent, commenced an action against the debenture holders for damages for breach of contract by reason of withdrawal of financial support. The defendants applied to set aside the writ on grounds of irregularity in that it was issued without the receiver's knowledge or consent. Upon the registrar dismissing the application, the defendants appealed to a judge who allowed the appeal and ordered the writ to be set aside on grounds of irregularity. The plaintiffs appealed. The defendants had contended that on the appointment of the receiver, the plaintiffs were divested of all power to bring an action and only the receiver could institute and pursue the action in question.

[9] In allowing the appeal, Shaw LJ had this to say:

> One has got to see what the function of a receiver is. It is not, of course, to wind up the company. It is perhaps interesting to note in passing that when a liquidator is appointed … the powers of the directors immediately cease by statutory provision. There is no such provision in relation to the appointment of a receiver, whose duty it is to protect the interests of the mortgagee or debenture holders, as the case may be. Insofar as it is requisite and necessary for him, in the course of his dealing with the assets of the company, bringing them in and realising them and so on, to bring actions as well, he is empowered to do so by the debenture deed in the name of the company. That makes it possible for him to institute such proceedings without exposing himself to the risk of a liability for costs if those proceedings should fail. But the provision in the debenture trust deed giving him that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation *where so doing does not in any way impinge prejudicially on the position of the debenture holders by threatening or imperiling the assets which are subject to the charge.*
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> (Emphasis added.)

[10] Learned counsel for the first and second defendants have also cited the case of *Tudor Grange Holdings Ltd and Others v Citibank NA and Another*

[1991] 4 All ER 1. In that case, the companies had commenced action against the bank for misrepresentation without the receiver's consent. In ordering the statement of claim to be struck out and the action dismissed, Sir Nicholas Browne-Wilkinson V-C held that *although in certain circumstances company directors had power to bring proceedings on behalf of the company even after the appointment of a receiver* who had power to bring proceedings on the company's behalf, *they had no power to do so where the receiver's position would be prejudiced by their decision to bring proceedings.* Since the action commenced by the directors of the plaintiff companies in the plaintiff companies' name could directly impinge on the property subject to the receivers' powers because the directors held no indemnity against the liability of the companies' assets to satisfy a hostile order for costs made against the companies, it followed that the directors had no power to start the proceedings. However, since there was a possibility of such an indemnity being forthcoming the action would not be struck out on that ground alone.

ARGUMENTS, SUBMISSIONS AND FINDINGS

[11] The first and second defendants have argued that the directors have not satisfied the conditions to be entitled to commence this action against them as receivers and managers of the plaintiffs. The directors' main and primary intention in pursuing this action is that they want the return of the impugned land. It was pointed out that prior to the appointment of the receivers and managers, the first and second plaintiffs had difficulty in servicing their loan facilities and were involved in various litigations by claimants all of whose claims invariably involved the impugned land. It was submitted that these litigations were a direct consequence of the directors' management or mismanagement of the plaintiffs and the impugned land and as such it would be contrary to common sense and ordinary prudence for the first and second defendants, as receivers and managers of the plaintiffs, to now relinquish their powers and allow the directors to take over the management of the impugned land. It follows there from that any claim for the return of the impugned land would inevitably impinge prejudicially upon on the position of the debenture holder as it threatens the very assets that were subject to the charge.

[12] The second thrust of the first and second defendants' argument is that the actions of the directors would interfere with the functions of the receivers and managers in getting in the assets which were subject to the charge. Various authorities were cited by learned counsel in support of their contention that the main and primary duty of a receiver and manager is to realise the company's assets, to distribute the proceeds to the debenture holders in satisfaction of their claims and to return any surplus assets to the company (*Re B Johnson & Co (Builders) LD* [1955] 1 Ch 634; *Tan Ah Teck (t/a Plumcon Plumbing & Construction Co) v Coffral (Malaysia) Sdn Bhd* [1992] 1MLJ 553).

[13] It is submitted that since their appointment, the first and second defendants have been discharging their duties pursuant to the terms of the debenture which provide, inter alia, for the power to sell the plaintiffs' assets. The effect of the orders sought by the directors would be to put an immediate stop to the activities undertaken by the first and second defendants for the sale of the plaintiffs' assets particularly the impugned land. If the sale and purchase agreement were terminated, the sale of the impugned land would be delayed and the first and second defendants would have had to undertake another tender exercise to secure purchasers for the land thus resulting in further delay and more costs. Thus, it is submitted that the directors' actions would be an interference of the functions of the first and second defendants.

[14] The first and second defendants have also highlighted that the directors have not provided an indemnity for costs in the event that they do not succeed in their action. Although it is stated in para 59 of the statement of claim that the directors of the first and second plaintiffs gives an undertaking as to costs and the director Jamariah bt Baharum had in her affidavit also undertaken as to damages, it is submitted by the first and second defendants that an undertaking as to costs is not an indemnity as to costs and that in any event no indemnity as to costs has been given *to the plaintiffs*. Reference was made to the Australian Federal Court case of *Deangrove Pty Ltd (recs and mgrs apptd) and Anor v Commonwealth Bank of Australia* 2002 AUST FEDCT LEXIS 370 where Sackville J had referred to earlier orders made by him in earlier proceedings between the same parties. Vide an order made on 2 October 2002, the court had ordered the second applicant (Mr Jeans) to provide to the respondent an irrevocable bank guarantee for a sum of RM87,000 by 7 November 2002, which date was subsequently varied to 16 November 2002. The rationale underlying the making of the order is that the interest of the debenture holder must not be prejudiced by the conduct of the litigation. The governing principle is in order to continue the proceedings, those giving instructions on behalf of deangrove must demonstrate that 'nothing in the course of the proceedings that they institute is going in any way to threaten the interest of the debenture holders'. As such, the failure of Mr Jeans to provide the required bank guarantee to support Deangrove's indemnity would threaten the interests of the bank as deangrove's debenture holder. in the absence of that guarantee, the bank is at risk of Deangrove's assets being reduced by reason of the litigation. In the final analysis, the court gave Mr Jeans an extension of time until 8 January 2003 to comply with the court's order. As was said by Sackville J:

> If Mr Jeans does not provide the guarantee within this period, it seems to me appropriate that the proceedings be dismissed on terms that the applicants be prevented from bringing further proceedings on the same causes of action for the same relief. The applicants have received repeated indulgences from the court and have had ample opportunity to prepare their case for trial. *If the guarantee is not*

provided, it would be the clearest possible indication that Mr Jeans is either unwilling or unable to provide the receivers with the security to which they are entitled if the applicants are to proceed with their claim. The failure to provide the guarantee would also expose the bank to a risk of financial loss in its capacity as debenture holder if it is still required to prepare for a hearing of the applicants' claims. For the reasons that are explained in deangrove No 1, the bank should not be subjected to that risk.

[15] As regards the director Jamariah bt Baharum's undertaking as to damages, it was pointed out that she is an undischarged bankrupt. In light of this undisputed fact, it was submitted that her undertaking as to damages or to pay costs is insufficient and amounts to no undertaking at all. As a bankrupt she does not have the capacity to give any undertaking at all, whether as to costs or damages, as all her assets and liabilities are vested in the official assignee.

[16] And lastly, it was submitted that the directors' actions were intended to stultify the first and second defendants' activities in selling the plaintiffs' assets. By restraining the sale of the impugned land, the directors are hindering the process of recovery to the third defendant as debenture holder. The effect of the orders sought would be to put a stop to the activities for the sale of the land. This in turn would cause the plaintiffs indebtedness, as well as the indebtedness of the guarantors, to rise in tandem with the delay.

[17] The plaintiffs have drawn the court's attention to the fact that the first plaintiff and the fourth defendant had in early 2003 entered into a joint venture project to develop ninety acres, which said project is part of the impugned land. After 102 units of the proposed development were completed there was a breakdown in the joint venture in 2005 which resulted in the parties being embroiled in Kuala Lumpur Civil Suit S6–22–1154 of 2006 which is still pending. In the said suit, the fourth defendant is asking, inter alia, for the ninety acres to be sold to them for RM32m whilst the first plaintiff had counterclaimed for the return of the ninety acres due to the fourth defendant's breach of its obligations under the joint venture agreement.

[18] The plaintiffs are relying on s 192(2) and 192(3) of the Companies Act 1965 as giving them the right to commence this action against the first and second defendants. It is obvious that s 192(2) has no application in this case. Section 192(2) reads as follows:

If it appears that any receiver or manager of the property of a company has misapplied or retained or become liable or accountable for any money or property of the company or being guilty of any misfeasance or breach of trust or duty in relation to the company, any *the Court may, on the application of creditor or contributory or of the liquidator,* examine into the conduct of the receiver or manager and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company

A by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust or duty as the Court thinks just.

(Emphasis added.)

B **[19]** At first blush, the court will say that s 192(2) has no application in this case as the action taken by the plaintiffs is not an application by a creditor, contributory or the liquidator. The court is unable to see how it could be argued that s 192(2) would authorise the plaintiffs to commence this action against the first and second defendants.

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[20] The plaintiffs have relied on the case of *Simpang Empat Plantation Sdn Bhd v Ali Tan Sri Abdul Kadir & Ors* [2006] 1 CLJ 41 as the authority for the proposition that there is no absolute prohibition upon the plaintiffs from bringing an action against the receivers and managers. The plaintiffs have also D relied on the case of *Newhart Development* which was also cited by learned counsel for the first and second defendants. It is interesting to note that that whilst both parties have relied on the same authority, different passages of the decision of Shaw LJ have been quoted by counsel in support of their cases. It is true that the court had held that:

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> But the provisions in the debenture trust deed giving him that power is an enabling provision which invests him with the capacity to bring an action in the name of the company. It does not divest the directors of the company of their power, as the governing body of the company, of instituting proceedings in a situation *where so doing does not in any way impinge prejudicially upon the position of the debenture* F *holders by threatening or imperiling the assets which are subject to the charge.*

Thus Shaw LJ's pronouncements as to the directors still retaining some power to institute proceedings is a qualified one. They would only have such power to institute proceedings if doing so would not impinge prejudicially upon the G position of the debenture holder.

[21] Further, whilst Shaw LJ had clearly stated there is no total extinction of the powers of the directors upon the appointment of receiver:

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> It is only within the scope of its assets which are covered by the debenture, and only insofar as it is necessary to apply those assets in the best possible way in the interests of the debenture holders that the receiver has a real function.

From this the court would gather that whilst the directors of a company under I receivership may still retain some of their powers, however insofar as it relates to the assets that were covered under the debenture, it is the receivers and managers who would have the ultimate authority.

[22] Various authorities have been cited by learned counsel for the plaintiffs.

In the case of *Tan Ah Teck v Coffral (M) Sdn Bhd* [1991] 4 CLJ (Rep) 63, the court was dealing with the issue of whether the receiver was competent to appear to object to a winding up petition against the respondent company. In that case, the receiver was appointed pursuant to a debenture but no documents were produced to support their contention that they were acting as agents on behalf of the respondent company. The court held that the receiver was not competent to object to the winding up order and that the directors could have brought such objection as the appointment of a receiver does not necessarily bring about a termination of the company's activities.

[23] In the case of *Risasa Industry (M) Sdn Bhd v Malaysian Industrial Development Finance Berhad & Anor* [2008] 6 CLJ 667, the plaintiffs had made an application for declarations, namely that the appointment of the receiver and manager was null and void. The situation is different in our instant case where the appointment of the receivers and manager has not been challenged.

[24] The directors have also raised an issue that the first and second defendants were in breach of their duties for failing to sell the impugned land in accordance with the National Land Code. They have raised the argument that where security is by way of a legal charge, the power of sale should be effected in the statutory manner pursuant to the provisions of the National Land Code and not by tender exercise or private sale. The authority relied upon by them for this proposition is the case of *Kimlin Housing Development Sdn Bhd (appointed receiver and manager) (in liquidation) v Bank Bumiputra (M) Bhd & Ors* [1997] 2 MLJ 805. The facts of *Kimlin* are essential to the decision and are thus recounted at some length.

[25] The appellant borrower was the registered owner of some lands. It executed two legal charges under the National Land Code over the lands in favour of Bank Bumiputra, the first respondent, to secure banking facilities granted to them. The charges were duly registered. Subsequently, the appellant executed a deed of debenture in favour of the first respondent to secure various banking facilities whereby the appellant created both fixed as well as a floating charge. The debenture, which was duly registered, provided for the bank to appoint receivers and managers and for their powers. Certain events having occurred, the bank duly appointed the second, third and fourth respondents as receivers and managers of the appellant. The receivers and managers then applied to the High Court by originating summons for leave to sell the land. On 27 February 1989 the appellant went into liquidation and the application to sell the land was opposed by the liquidators.

[26] The trial judge at first instance held that the receivers and managers were entitled to sell the lands which were subject to the charges without taking proceedings under the National Land Code to obtain a judicial sale and that

the fact that the company had been put into liquidation does not affect the securities held by the receivers and managers, at least not until the secured creditors had been fully paid off. The trial judge further held that the receivers and managers were entitled to what the debenture provided. The liquidator appealed against the above decision.

[27] The Supreme Court, in allowing the appeal, held, inter alia, that the provisions of the National Land Code setting out the rights and remedies of parties under a statutory charge over land comprised in Pt XVI are exhaustive and exclusive and any attempt at contracting out of those rights would be void as being contrary to public policy. Therefore, the receivers and managers were not entitled to sell the charged lands by virtue of the powers conferred upon them by the debenture without taking proceedings under the Code to obtain a judicial sale. The Supreme Court further held that with the advent of liquidation, any sale by the receivers would be a purported sale of property which belonged to the borrower company and the appellant would require the approval of the court under s 223 of the Act.

[28] Whether the decision in *Kimlin* is applicable to the facts of our instant case will be dealt with later in this decision.

[29] In coming to a decision, the court has carefully considered the affidavits and written submissions filed by the parties. From the outset, the court would say that it is in agreement with learned counsel for the directors that there is no absolute prohibition against them from bringing an action in the name of the plaintiffs. The appointment of receivers and managers, as opposed to the appointment of a liquidator, does not end the life of a company. As was said in *Moss Steamship Co Ltd v Whinney* [1912] AC 254:

> The legal persona of the company will continue to subsist until liquidation. The company is, so to speak, anaesthetised but the receiver may carry on business on its behalf.

[30] However, as to whether a company in receivership can commence action against its own receivers, and if so, the circumstances and conditions under which it can do so, remains to be seen. Both parties have cited the case of *Newhart Development* as a leading case on this issue. Applying the principles as set out in *Newhart Development* to our instant case, the court is satisfied that the directors would have locus standi to commence this action against the first and second defendants as the appointed receivers and managers of the plaintiffs if the following conditions are satisfied:

(a) if the directors' actions did not interfere with the receivers and managers' function in getting in the plaintiffs' assets or prejudicially affect the third defendant as debenture holder by imperiling the assets;

(b) if the directors' actions did not in any way threaten the interests of the third defendant as debenture holder; and

(c) if the directors have provided an indemnity for the plaintiffs against any possible liability to costs.

[31] As is clearly stated in the statement of claim, the directors are seeking various injunctive reliefs, inter alia, to restrain the defendants from proceeding with the sale and purchase agreement dated 21 January 2011 entered into between the first plaintiff and the fourth defendant relating to the impugned land. This is the same land for which various loans had been granted by the third defendant for its purchase by the plaintiffs and in respect of which charges and debentures have been executed by the plaintiffs.

[32] The court notes that it was as a consequence of the default in repayment of the loan facilities granted that receivers and managers were appointed for the plaintiffs. What then is the role of the first and second defendants as the appointed receivers and managers? It is to deal with the assets of the plaintiffs, to bring them in and realise them, to distribute the proceeds to the third defendant as debenture holder in satisfaction of its claims and thereafter to return any surplus assets to the plaintiffs. Whilst the directors may still retain some residual power or authority, in so far as those assets in respect of which the receivers and managers were appointed to bring in and realise, any action by them would tantamount to interference with the functions of the receivers and managers in getting in the assets subject to the charge as well as threatening the interests of the third defendant as debenture holder.

[33] The rationale for care and caution in respect of directors of a company, for whom receivers and managers have been appointed, commencing action in the name of the company lies in the risk of a liability for costs. A company for whom receivers and managers have been appointed can ill afford further dissipation of its remaining assets through misconceived legal action giving rise to a liability for costs. As pointed out in *Tudor Grange Holdings*:

> Since the action commenced by the directors of the plaintiff companies in the plaintiff companies' name could directly impinge on the property subject to the receivers' powers because the directors held no indemnity against the liability of the companies' assets to satisfy a hostile order for costs made against the companies, it followed that the directors had had no power to start the proceedings.

[34] The court has considered whether para 59 of the statement of claim to the effect that the directors of the first and second plaintiffs giving an undertaking as to costs amounted to an indemnity for costs. The court has also considered the undertaking as to damages given by Jamariah bt Baharum in her affidavit. It is not disputed that Jamariah bt Baharum had been adjudged a

bankrupt on 2 September 2008. As such at the time when she gave the undertaking, she was an undischarged bankrupt. Notwithstanding RHB's letter dated 2 December 2008, the court finds that the fact remains that Jamariah is an undischarged bankrupt and, as such, has no legal capacity to give any undertaking as to costs or damages.

[35] The court recalls the averments of the director, Chek Jamal Baharom, in his affidavit, to the effect that the value of the land is more than sufficient to compensate for all losses, if any. The court agrees with the submission of learned counsel for the first and second defendants to the effect that this averment would go to show that the directors are dependent upon the realisation of the impugned land to compensate the parties and that this would prejudice the debenture holder by placing the assets subject to the charge in peril.

[36] In light of the foregoing, the court finds that merely pleading that the directors of the first and second plaintiffs give an undertaking as to costs falls far short of the requirement of giving an *indemnity as to costs* to the plaintiffs. The court finds that in the absence of any evidence as to the financial position of the other directors, excluding Jamariah bt Baharum, and thus their ability to satisfy any order as to costs or damages, coupled with the equivocal averment of Chek Jamal Baharom referred to in para 35, the court finds that the directors have not satisfied the requirement for giving an indemnity to the plaintiffs.

[37] The case of *Kimlin* cited by learned counsel for the directors have afforded the court some concern as to whether there is a legal requirement for the first and second defendants to sell the impugned land in accordance with the provisions of the National Land Code. Reference has been made by learned counsel for the first and second defendants to the case of *Melantrans Sdn Bhd v Carah Enterprise Sdn Bhd & Anor* [2003] 2 CLJ 86 and a careful perusal of this case will afford the answer. In that case, the first respondent, the registered proprietor of a lease, had executed a debenture and a legal charge in favour of the second respondent bank. Pursuant to the provisions of the debenture, the second respondent appointed a receiver and manager ('R&M') in respect of the assets and undertakings of the first respondent. The R&M was also empowered to act as the agent of the first respondent and to effect the sale of the asset secured by the debenture. The R&M was also appointed the lawful attorney of the first respondent.

[38] The R&M then entered into a sale and purchase agreement with the appellant to sell the lease. Subsequently, the appellant refused to proceed with the agreement on the ground that the R&M did not have the power to sell the lease by private agreement on the authority of *Kimlin* where the Supreme

Court had decided that receivers and managers were not entitled to sell charged lands without taking proceedings under the National Land Code for a judicial sale.

[39] The respondent obtained a declaration in the High Court that the R&M was empowered to sell the lease and the sale and purchase agreement was valid and binding. The appellant appealed to the Court of Appeal which distinguished *Kimlin* and dismissed the appeal. The appellant then appealed to the Federal Court.

[40] At the Federal Court, the issue was whether the facts in *Melantrans* were distinguishable from the facts in *Kimlin* thus entitling the R&M to sell the lease by private treaty. The Federal Court found that in *Kimlin*, the debenture created by the borrower company did not contain an express provision appointing the receivers and managers as the attorney of the borrower company. Secondly, the borrower company went into liquidation and it was the liquidator who had opposed the application for sale under the debenture. Further, s 256(2) of the National Land Code provides a prescribed method of sale to be undertaken by a chargee and not a charger. In the case of *Melantrans*, the R&M undertook the sale on behalf of the first respondent, the chargor of the lease. The Federal Court found that the provisions of the National Land Code prescribing judicial sale did not apply because the R&M was acting as the agent for the chargor and not the chargee and thus distinguished the case of *Kimlin*.

[41] Thus applying the reasoning and decision in *Melantrans* to the facts of our instant case, the court is satisfied that the case of *Kimlin* can also be easily distinguished. In our instant case, although receivers and managers were appointed, no winding up proceedings were commenced nor was any liquidator appointed for the plaintiffs. In this case, cl 12.1(b) of the debenture entered into between the plaintiffs and the third defendant clearly states that the borrower irrevocably appoints the manager of the lender or one of the officers in charge to be its attorney to demand, sue for and take all appropriate proceedings. Further cl 12.2 provides that a receiver so appointed shall be the agent of the borrower and shall have power to take possession of, or collect, or get in any charged property. As such, in our instant case as in the case of *Melantrans*, the first and second defendants, as receivers and managers were also acting as the agent of the chargor. The provisions of s 256(2) of the National Land Code prescribing judicial sale therefore do not apply to our instant case. The court thus finds that the case of *Kimlin* can be distinguished.

CONCLUSION

[42] In conclusion, the court finds that the directors have not satisfied the

court that they have locus standi to bring a case in the names of the plaintiffs against the first and second defendants as the receivers and managers appointed for the plaintiffs. The court finds that in the circumstances of this case, the action commenced by the directors which is essentially to stop the sale of the impugned land to the fourth defendant and to secure the return of the said land to the plaintiffs would definitely and undeniably interfere with the functions of the first and second defendants in getting in the plaintiffs' assets, namely the impugned land. The actions of the directors to stop the sale also clearly threaten the interests of the third defendant as debenture holder since the sale and realisation of the assets of the plaintiffs would have enabled the third defendants to be repaid. And lastly, the absence of a clear indemnity against costs and damages by competent directors to the plaintiff would have placed an inordinate and additional financial burden on the plaintiffs which would have a direct impact on its assets.

[43] The court is thus satisfied that the actions of the directors in commencing an action in the name of the plaintiffs against, inter alia, the first and second defendants without giving a proper indemnity to the plaintiffs would run afoul of the principles laid out in *Newhart Development* and followed in *Simpang Empat*. On that basis, the court finds that the directors have no locus standi to commence this action. Accordingly, the court would allow the application of the first and second defendants in encl 13 and order that that the suit be struck off with costs. Costs, which are to be borne by the directors of the plaintiffs personally, are to be taxed unless otherwise agreed.

[44] In light of the decision of the court in encl 13, the directors' application in encl 4 is also struck off with costs. Costs are to be taxed unless otherwise agreed, such costs to be borne by the directors personally.

Enclosure 13 to strike out suit allowed with costs and directors' application in encl 4 struck out with costs.

Reported by Ashok Kumar